No. 88-192

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

McKESSON CORPORATION,
Petitioner,

VS.

DIVISION OF ALCOHOLIC BEVERAGES and TOBACCO,
DEPARTMENT OF BUSINESS REGULATION,
and OFFICE OF THE COMPTROLLER,
STATE OF FLORIDA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL
JOSEPH C. MELLICHAMP, III
Chief, Tax Section
Counsel of Record
and
DANIEL C. BROWN
Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, FL 32399-1050
(904) 487-2142
Attorneys for Respondents

QUESTIONS PRESENTED

1. Does the Commerce Clause, U.S. Const., art. I, §8, cl. 3, unaided by any Congressional act, operate to waive the sovereign immunity of the State against a suit for damages allegedly flowing from a legislative act where, under adequate and independent state law, the Petitioner is not entitled to a refund of taxes paid?

2. Is that question, if substantial, properly presented in this case?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Page

Page

Constitutional Provisions, Statutes, and Rules

Page

No. 88-192

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

McKESSON CORPORATION,
Petitioner,

VS.

DIVISION OF ALCOHOLIC BEVERAGES and TOBACCO,
DEPARTMENT OF BUSINESS REGULATION,
and OFFICE OF THE COMPTROLLER,
STATE OF FLORIDA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Respondents Accept Petitioner's statement.

JURISDICTION

Respondents accept Petitioner's statement. However, Respondents assert that the question of Petitioner's entitlement, as a taxpayer, to a refund of the taxes at issue is settled by state law independent of the federal question which Petitioner seeks to pose. Further, Respondents assert that Petitioner's recasting of its tax refund claim as one for damages in recompense for alleged competitive injury flowing from the Florida Legislature's enactment of §§564.06 and 565.12, Fla. Stat. (1985), presents an insubstantial federal question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents accept Petitioner's statement. Because of Petitioner's framing of the issue, §768.28, Fla. Stat. (1985), Florida's general sovereign immunity waiver, is also involved. That section is reprinted as Appendix A. Sections 215.26, 561.50, 564.06(6) and 565.13, Fla. Stat. (1985), are also involved. They bear upon the treatment of beverage excise taxes under Florida law and the conditions for tax refunds. Those sections of the Florida Statutes are reprinted as Appendix B.

STATEMENT OF THE CASE

Respondents accept Petitioner's Statement of the Case with the following exceptions and additions.

Respondents did not concede below and do not concede here that statements by, or

motivations of, individual legislators are relevant, admissible or probative. However, in answer to Petitioner's implication at page 2 of its Petition that the 1985 amendments to §§564.06 and 565.12, Fla. Stat., were enacted with protectionist intent by the Florida Legislature as a whole, Respondents note that the record presents conflicting inferences on that score. For instance, the Chairman of the Senate Finance and Taxation Committee in his comments during committee hearings indicated his desire to modify Florida's then-existing alcoholic beverage tax to meet the constitutional principles enunciated in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). His comments are reprinted as Appendix C, p. 36a. Despite the comments of some individual legislators, the indication is that the

Florida Legislature, as a body, believed that the 1985 amendments would expand the availability of Florida's tax preference to non-Florida manufacturers of alcoholic beverages, when one examines the structure of the law itself. The 1985 amendments contain elaborate sliding scale tax rates designed to place a floor under the erosion of the tax base which would be occasioned by the unchecked growth of manufacturers selling tax-preferred alcoholic beverages in Florida. A comparison of §§564.06 and 565.12, Fla. Stat. (1985) with their previous counterparts, §§564.06 and 565.12, Fla. Stat. (1984 Supp.), reveals no such capping formula in the 1984 version of the statutes. See, Appendix D, p. 38a, E, p. 47a.

The inescapable reason for the presence of the sliding scale tax structure in the 1985 statutes, and for its absence in the

previous statutory versions, was a legislative perception that the 1985 statutes would expand the availability of Florida's tax preference to manufacturers outside of Florida which had not previously received tax preferences in Florida. The trial court, after hearing the evidence, resolved those conflicting inferences by finding:

> These [1985] amendments were an effort by the legislature to overcome the constitutional problems in the Florida Alcoholic Beverages laws resulting from the Bacchus decision. This Court, having reviewed the challenged amendments finds, however, that this legislation failed to surmount the constitutional violation addressed in Bacchus.

Division of Alcoholic Beverages and Tobacco v. McKesson Corp., 524 So.2d 1000, 1002 (Fla. 1988) (bracketed material added). The case evinces no finding by the trial court of protectionist motive, as opposed

to a good faith effort, though unavailing, to modify Florida's public policy in response to Bacchus.

In regard to McKesson's tax refund claim, it is the law of Florida that the general refund statute, §215.26, Fla. Stat. (1985), under which McKesson purported to seek a refund, allows for a tax refund only when the applicant bears the financial burden of an excise tax, as contrasted to the formal legal incidence of the tax. State, ex rel. Szabo Food Services, Inc. v. Dickinson, 286 So.2d 529 (Fla. 1973) (hereinafter referred to as "Szabo.") McKesson never denied below that it in fact passed the cost of the tax on to its customers. Rather, McKesson asserts that it suffered injury in its market share and attendant profits because of the challenged statutes. See Appellee and Cross-Appellant McKesson Corporation's Motion for Rehearing

before the Florida Supreme Court, reprinted as Appendix F, at p. 70a.

The record below demonstrates that of $100,000,000 in sales during 1985 in its Miami, Florida district, McKesson collected all but $60,000 in receivables from such sales, due to the compulsions of Florida law upon retail alcoholic beverage vendors. Deposition of Stan F. Starzyk, p. 79, line 18 - p. 83, line 4, reprinted as Appendix G, p. 82a. See §561.42, Fla. Stat. (1985). Although McKesson refused to answer the State's discovery requests aimed at conclusive proof that McKesson was reimbursed for the beverage excise tax by its customers on units sold, Mr. Starzyk's testimony, together with the structure of Florida's beverage tax laws, provided sufficient evidence to support the conclusion of the Florida Supreme Court that the cost of the tax had likely been

passed on to McKesson's customers. See Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, supra, at 1010.

McKesson's implication that the Florida Legislature enacted the 1988 beverage tax structure to reinstate the former provisions after the Florida Supreme Court struck the tax preference provisions from the 1985 statutes receives no support in the record. In fact, Ch. 88-308, Laws of Florida, to which McKesson refers at page 5 of its Petition, is closely patterned after Georgia's beverage tax law, recently upheld by the Supreme Court of Georgia as being an exercise of core Twenty-first Amendment powers and thus not in violation of the Commerce Clause. Heublein, Inc. v. State, 351 S.E.2d 190 (Ga. 1987), appeal dismissed, 107 S.Ct. 3253 (1987).

REASONS FOR DENYING THE WRIT

I.

THE NOTION THAT THE DORMANT COMMERCE CLAUSE, OF ITS OWN FORCE, OPERATES TO WAIVE THE SOVEREIGN IMMUNITY OF FLORIDA FROM SUITS SEEKING DAMAGES DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

This suit was brought by McKesson directly against agencies of the executive branch of state government. §§20.16(2)(a), 20.12(1), Fla. Stat. (1985). McKesson purported below to bring this action as a taxpayer refund suit. (McKesson also sought declaratory and injunctive relief.) The law in Florida as to entitlement to refunds of excise taxes under §215.26, Fla. Stat., (1985), is that one may not obtain such a refund without showing that he bore the financial burden

of the tax. Szabo, supra. Accord, Shannon v. Hughes & Co., 270 Ky. 50, 109 S.W.2d 1174 (1937).[1]

McKesson never denied below that it passed the financial burden of Florida's

---

[1] Scrutiny of McKesson's statement at page 5, note 2, of its Petition shows that McKesson's alleged right, as a taxpayer, to a tax refund is controlled by state law. McKesson complains that the Florida Supreme Court "reinterpreted" its earlier decisions. The cases cited by McKesson--City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1 (Fla. 1972); Interlachen Lakes Estates, Inc. v. Brooks, 341 So.2d 993 (Fla. 1976); Osterndorf v. Turner, 426 So.2d 539 (Fla. 1982); City of Tampa v. Thatcher Glass Corp., 445 So.2d 578 (Fla. 1984); and Colding v. Herzog, 467 So.2d 980 (Fla. 1985)--all dealt with refunds of ad valorem, not excise taxes, or with fees imposed on an end consumer, and thus are not inconsistent with Florida's rule under §215.26, Fla. Stat., as to excise taxes imposed in the middle of a distribution chain on discretely identifiable product units. There was no "reinterpretation" by the Florida Supreme Court, for those decisions co-exist with the Szabo decision. However, McKesson's focus on Florida law demonstrates its unstated concern that there is no independent federal right under the Commerce Clause to a tax refund.

beverage excise tax on to its customers. Nor does it do so before this Court. Florida law is, in fact, quite clear that licensed alcoholic beverage wholesalers, such as McKesson, are merely collection conduits for the alcoholic beverage excise tax. The tax is not due until the tenth day of the month following the month in which McKesson sells beverages at wholesale. §561.50(1), Fla. Stat. (1985). Yet, McKesson's customers are required to remit payment to McKesson no later than ten days after receiving beverages from McKesson. §561.42(1),(2), Fla. Stat. (1985). McKesson therefore has up to a forty-day float period between the time it receives payment from its customers and the time that the tax remittance to Florida for such beverages is due.

Recognizing that the wholesale distributors are in fact mere collection

conduits for the tax, §§564.06(6) and 565.13, Fla. Stat. (1985), allow collection credits to McKesson quite similar to those provided under Florida's general sales tax statute. Compare §§564.06(6), 565.13, Fla. Stat. (1985) with §212.12, Fla. Stat. (1985). See also, §561.506, Fla. Stat. (1985) (wholesaler deductions from tax collection payments). Under Florida's regulations a price offered to one of McKesson's customers must be offered equally to all. Fla. Admin. Code Rule 7A-4.0471 (Appendix H, p. 88a). The amount of the tax is large in relation to the unit price of the product (e.g., $9.53 per gallon on distilled spirits of more than 48% alcoholic content during the period in question). Thus, economic necessity virtually compelled a pass-through of the financial burden of the tax. Accordingly, the Florida Supreme Court applied Florida's

law as to taxpayer refund actions and concluded that McKesson was not entitled as a taxpayer to a refund, since granting it would create a windfall to McKesson. See also National Distributing Co. v. Office of the Comptroller, 523 So.2d 156 (Fla. 1988).[2]

McKesson asserts, instead, that it is entitled to a tax refund not for taxes it

---

[2] Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d. 707 (1977) and Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968) are, as McKesson concedes, antitrust cases. They were cases where the grievamen of complaint was damage to business markets, made specifically actionable by the terms of the Anti-trust Laws. Those cases did not involve the sovereign immunity of a state from suit for alleged injury to business interests. They have no bearing here. This case below was brought as a taxpayer's action for taxes paid, not a businessman's statutory action for damages. The rule in antitrust cases notwithstanding, Florida's law concerning taxpayer refund suits is that one who has passed the financial burden of an excise tax on to his customers in the distribution chain is not entitled to a refund.

paid, but rather as compensation for competitive injury--loss of sales and market share--allegedly caused by Florida's statutory enactments. See Petition for Writ of Certiorari, pp. 4, 5, 14; Appellee and Cross-Appellant McKesson Corporation's Motion for Rehearing in Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, supra, reprinted as Appendix F, p. 70a.

At bottom, McKesson asserts nothing more than a right to a damage award as compensation for an alleged "constitutional tort," the legislative enactment of §§564.06 and 565.12, Fla. Stat. (1985). McKesson's assertion runs afoul of the sovereign immunity of Florida. Florida has enacted a limited sovereign immunity waiver, §768.28, Fla. Stat. (1985). Florida, however, has not waived its immunity from suits for damages where the

gravamen of the complaint is injury allegedly flowing from a basic act of governance, such as the passage of legislation. Trianon Park Condominium Ass'n. v. City of Hialeah, 468 So.2d 912 (Fla. 1985). See also, Gamble v. Florida Dep't. of Health & Rehabilitative Services, 779 F.2d 1509, 1515 (11th Cir. 1986) (Section 768.28, Florida Statutes, intended to waive sovereign immunity for traditional torts under state law but not for "constitutional torts"); Hill v. Department of Corrections, 513 So.2d 129, 131 (Fla. 1987), cert. denied, 108 S.Ct. 1024 (1988). The result does not change simply because McKesson artfully attempts to disguise its claim for damages as one for a tax refund. Shannon v. Hughes & Co., 270 Ky. 530, 109 S.W.2d 1174 (1937).

Since Florida has not waived the "fundamental rule of sovereign immunity

which bars suit against a state without consent given," Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 907, 79 L.Ed.2d 67 (1984), McKesson attempts to persuade the Court that the dormant Commerce Clause, of its own force and without the aid of any Congressional enactment on the subject, not only permits, but requires, a waiver of the State's sovereign immunity from suits for damages payable from the State's treasury.

McKesson's Petition presents an insubstantial argument on this point. Although the Court has many times said that the Commerce Clause, in its dormancy, acts as a restriction on the States' powers, it has never suggested that the Clause operates as a waiver ex proprio vigore of

the States' fundamental immunity from damage suits.[3] In fact, this Court held in Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S.Ct., 347, 89 L.Ed. 389 (1945), that a suit in federal court for refund of taxes, founded on a Commerce Clause challenge, was barred by the Eleventh Amendment. Since the dormant Commerce Clause does not waive the States' Eleventh Amendment immunity, it cannot operate to waive the fundamental rule of

---

3 For instance, in Fitzpatrick v. Bitzer. 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), the Court in a similar context noted that Congressional action to enforce the Fourteenth Amendment to the Constitution of the United States could remove the States' Eleventh Amendment immunity from damage suits, a result which would be "constitutionally impermissible in other contexts." Id., 96 S.Ct., at 2671. MR. JUSTICE STEVENS suggested that the Commerce Clause also supplied such Congressional authority, but did not suggest that the Commerce Clause itself, without Congressional enforcement legislation, could be said to create such a waiver.

the States' sovereign immunity, of which the Eleventh Amendment is but an exemplification. See Pennhurst State School & Hospital v. Halderman, supra, 104 S.Ct., at 907. That is particularly true in light of the Court's scrupulous insistence that the abrogation of the Eleventh Amendment's immunity must be clearly and unequivocally expressed by Congress. E.g., Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979).

Nothing in the reasoning and holding of Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349; 30 L.Ed.2d 296 (1971), suggests that Chevron intended to lay down a constitutionally mandated rule on the retroactive application of judicial decisions. It should not be so expanded on the facts of this case, facts which directly implicate the sovereign immunity of the States and which would call upon the

Court to necessarily find within the dormant Commerce Clause a waiver of the States' traditional immunity from damage suits.

McKesson's extension of the dormant Commerce Clause is not only undercut by precedent; it rests upon an incorrect premise: that no other remedy is effective. That premise is demonstrably wrong. Temporary restraining orders which have the effect of permitting an aggrieved taxpayer to escrow challenged taxes pending outcome of suit are enforceable by this Court when necessary to protect federal constitutional interests. American Trucking Ass'n, Inc. v. Gray, 108 S.Ct. 2 (1987). Moreover, the Florida courts have approved procedures allowing aggrieved taxpayers to escrow or to self-accrue challenged taxes during the pendency of litigation over their constitutionality,

thus avoiding the questions of sovereign immunity which attend tax refund actions. Eastern Air Lines, Inc. v. Department of Revenue, 455 So.2d 311 (Fla. 1984). Temporary injunctive relief is an available taxpayer remedy under Florida law in suits challenging the validity of a tax. See Lee v. Bond-Howell Lumber Co., 123 Fla. 202, 166 So. 733 (1936). See, generally, Overstreet v. Ty-Tan, Inc., 48 So.2d 158 (Fla. 1950); Atlantic Nat. Bank of Jacksonville v. Simpson, 136 Fla. 809, 188 So. 636 (1938). The withholding of taxes pending the outcome of suit is most certainly as effective a tool as the refunding of them.[4]

---

[4] For that reason, if for no other, the cases relied upon by McKesson as supporting its claim of a federally-guaranteed "refund-as-damages" remedy are not on point. For instance, in Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor, 223 U.S. 280, 32 S.Ct. 216, 56 L.Ed. 436 (1912), the court noted the unavailability of

II.

THE POSTURE OF THIS CASE IS ILL-SUITED TO RESOLVE THE ISSUE PRESENTED.

The Court should decline, on the face of it, McKesson's invitation to cut from whole cloth a waiver of the States' immunity based upon the dormant Commerce Clause. The balance of state and federal interests in the matter is at the same time so delicate and so broad in repercussion that, under the best of circumstances, the endeavor is uniquely ill-suited to case-by-case adjudication. There is prudence in the Court's historical reluctance to undertake such a task, particularly since

---

injunctive relief under state law to interfere with tax collection. See also Iowa-Des Moines State Bank v. Bennett, 284 U.S. 239 52 S.Ct. 133, 76 L.Ed 265 (1931). Moreover, no issue of a state's sovereign immunity was raised or decided in those cases.

the entire issue is within the sphere of Congressional power to resolve. See Parden v. Terminal R. of Alabama Docks Dep't., 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964).

Moreover, the record in this case does not lend itself to a clear exposition of the issues in an area where clarity is certainly essential. This is not a case where state law forbade McKesson any pre-payment challenge to the taxes in question. Rather, Florida's procedural law countenances temporary injunctive relief in taxpayer actions. See, e.g., Lee v. Bond-Howell Lumber Co., supra. This is not a case in which McKesson sought temporary relief before paying the tax and was denied such relief. Rather, McKesson waited until the statutes had been in effect for fifteen months before bringing suit. This is not a case in which the state courts denied

McKesson a plain, speedy and efficient remedy. Instead, the Florida courts accorded expedited hearings to McKesson at all stages of the proceedings below.

McKesson did not timely pursue an effective remedy available to it. This case is therefore a poor vehicle upon which to delineate the circumstances in which relief in the form of damages might be a remedy, assuming in the first instance that the question of a Commerce Clause guarantee of such a remedy under any circumstances is at all substantial.

CONCLUSION

McKesson's asserted right to a refund of taxes paid under §§564.06 and 565.12, Fla. Stat. (1985), is governed by state law independent of the federal question which McKesson seeks to present. There is competent substantial evidence to support

the finding of the Florida Supreme Court that McKesson passed the tax burden on to its customers. Therefore, under Florida's tax refund statute, McKesson is not entitled to a refund as a taxpayer. McKesson's claim that it is entitled to a refund, not to recoup the value of taxes which it paid, but as compensation for alleged business injury under the dormant Commerce Clause presents an insubstantial federal question. That claim is barred by Florida's sovereign immunity. Even were that claim substantial, this case does not present a record on which the parameters of such a novel issue can be defined with the clarity needed to guide the States in such a sensitive area. The Court has spoken on this subject before. This case presents no occasion to revisit existing precedent.

Respondents urge the Court to decline review.

Dated: September ___, 1988

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL
JOSEPH C. MELLICHAMP, III
Chief, Tax Section
Department of Legal Affairs
Counsel of Record
STATE OF FLORIDA
OFFICE OF THE ATTORNEY GENERAL
and
DANIEL C. BROWN
Assistant Attorney General
The Capitol
Tallahassee, FL 32399-1050
(904) 487-2142
Attorneys for Respondents

APPENDIX A

§768.28(1),(2),(5), Florida Statutes (1985)

(1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person,

would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.

(2) As used in this act, "state agencies or subdivisions" include the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.

* * * * *

(5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $200,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act upto $100,000 or

$200,000, as the case may be; and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature. The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity before July 1, 1974.

APPENDIX B

Portions of Chapters 215, 561, 564 and 565, Florida Statutes

Section 215.26(1), Fla. Stat. (1985):

The Comptroller of the state may refund to the person who paid same, or his heirs, personal representatives, or assigns, any moneys paid into the State Treasury which constitute:

(a) An overpayment of any tax, license, or account due;

(b) A payment where no tax, license, or account is due; and

(c) Any payment made into the State Treasury in error;

and if any such payment has been credited to an appropriation, such appropriation shall at the time of making any such refund, be charged therewith. There are appropriated from the proper respective

funds from time to time such sums as may be necessary for such refunds.

Section 561.50(1), Fla. Stat. (1985):

There shall be only one state tax paid as to each gallon or fraction thereof of beverage sold under the Beverage Law, and no other excise tax shall be levied directly or indirectly. Such tax shall be computed from the reports, books, and records of manufacturers and distributors; and the amount so computed shall be remitted with the report required by s.561.55 to the division at intervals of 1 month, on or before the 10th of each month, for all beverages sold during the previous calendar month, and such payment of tax shall accompany the report required by s.561.55. If the monthly tax liability of a manufacturer or distributor exceeds the amount of the bond furnished for payment of

taxes, the division, upon a finding based upon substantial and competent evidence that the security of the tax revenue involved is in jeopardy, may require a bond equal to the anticipated tax liability of the manufacturer or distributor. Additionally, the division may increase the frequency of the remittance of the tax when the security of the tax involved is in immediate jeopardy or the financial condition of the manufacturer or distributor is unstable and the potential tax liability exceeds the bond furnished under the Beverage Law. In arriving at a conclusion that the security of the tax revenue involved is in jeopardy, the division shall consider and be guided by prior history, if any, of the compliance or noncompliance by the manufacturer or distributor with beverage tax obligations; the transient or nontransient nature of the

manufacturer or distributorship; the type of inventory, the equity of the manufacturer or distributor therein, and the mobility of such inventory; the financial status of the manufacturer or distributor; and the anticipated tax obligation of the manufacturer or distributor.

Section 561.506, Fla. Stat. (1985):

(1) For 11 months beginning with the tax collection payment due the division on August 10, 1969, each wholesaler shall remit the tax due, plus a repayment in the amount of 16.4 percent of the tax due to the division. Up to 10 percent of the total payment may be made in the form of revenue stamps previously purchased.

(2) Beginning August 10, 1971, each wholesaler may deduct from his monthly tax collection payment an amount not to exceed

2 percent of the prepaid amount to his credit as of June 11, 1970, which amount shall include any unamortized stamps.

Section 564.06(6), Fla. Stat. (1985):

(6) Every distributor selling wine within the state shall pay the tax to the division monthly on or before the 10th day of the following month, less 1.9 percent of the tax due, which shall be withheld by the distributor for keeping prescribed records, furnishing bond, and properly accounting for and remitting taxes due to the state. However, no allowance shall be granted or permitted when the tax is delinquent at the time of payment.

565.13, Fla. Stat. (1985):

Every distributor selling spiritous beverages within the state shall pay the tax to the division monthly on or before

the 10th day of the following month, less 1.0 percent of the tax due, which shall be withheld by the distributor for keeping prescribed records, furnishing bond, and properly accounting for and remitting taxes due to the state. However, no allowance may be granted or permitted when the tax is delinquent at the time of payment.

APPENDIX C

Excerpt of Comments by the Chairman of the Committee on Finance and Taxation, Florida Senate, During Committee Hearings on Senate Bill 425 on May 14, 1985

Chairman:

Senator, to respond to your question, as you remember in the Commerce Committee, the extent of discussion about that and Senator Grant had a different opinion about this, but I thought we got him satisfied back then, but there's a basic distinction in the type of taxation, type of production and currently the reason the exemption for gasohol is currently in effect. What's I'm trying to do is keep the exemption for distilleries in effect. And what has happened in the Supreme Court in the Bacchus case is that has made a ruling that would tend to jeopardize our existing language, which has been on the books,

because of the technical aspects of the Bacchus decision. What this attempts to do would be to redraw it, the same basic dollar amount, the same concept, but make it so that it's constitutional. So this question on this issue we have a constitutional problem which we are dealing with and the other question is simply a policy matter.

APPENDIX D

Sections 564.06 and 565.12, Fla. Stat. (1984 Supp.)

564.06 Excise taxes on wines and beverages; exemptions.-

(1) As to beverages including wines, except natural sparkling wines and malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, there shall be paid by all manufacturers and distributors a tax at the rate of $2.25 per gallon.

(2) As to all wines, except natural sparkling wines, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, manufactured in Florida from Florida-grown fresh fruits, berries, or grapes and not from concentrates thereof, except concentrates of fruits, berries, or grapes grown and

concentrated in Florida and bottled in Florida, and upon all other such beverages, except malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight manufactured and bottled in Florida from Florida-grown citrus products, citrus byproducts, honey, fresh fruits, berries, grapes, sugarcane, guavas, potatoes, peaches, papayas, strawberries and mangoes, and not from concentrates thereof, except concentrates grown and concentrated in the state, the tax imposed by subsection (1) shall not apply.

(3) As to all wines, except natural sparkling wines containing 14 percent or more alcohol by weight, there shall be paid by manufacturers and distributors a tax at the rate of $3 per gallon, except that this tax shall not be required to be paid upon

all wines manufactured in Florida from fresh fruits, berries, or grapes grown in Florida and not from concentrates thereof, except concentrates of fruits, berries, or grapes grown and concentrated in this state, bottled within this state, and containing 14 percent or more of alcohol by weight.

(4) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of $3.50 per gallon, except that this tax shall not be required to be paid upon all natural sparkling wines manufactured in Florida from fruits, berries, or grapes grown in Florida and not from concentrates thereof, except concentrates of fruits, berries, or grapes grown and concentrated in this state and bottled within this state.

(5) As to all beverages taxed under this section which are manufactured or bottled in Florida, there shall be a 2-percent discount allowed to the manufacturer or bottler on the amount of taxes assessed against wine for his losses from shrinkage, in filtering, breakage, and waste in bottling, the 2 percent to be computed on the taxable amount assessed by the state when sold taxpaid; and the 2 percent shall be deducted by the manufacturer or bottler on his monthly report.

(6) Wine used by any established church as sacramental wine or in connection with religious services is hereby expressly exempted from the provisions of this section.

(7) Every distributor selling wine within the state shall pay the tax to the division monthly on or before the 10th day of the following month, less 1.9 percent of the tax due, which shall be withheld by the distributor for keeping prescribed records, furnishing bond, and properly accounting for and remitting taxes to the state. However, no allowance shall be granted or permitted when the tax is delinquent at the time of payment.

(8) The exemption from the payment of taxes provided in subsections (2), (3), and (4) does not preclude the division from making periodic inspections necessary to carry out the provisions of this section.

(9) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a

post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

565.12 Excise tax on liquors and beverages.-

(1)(a) As to beverages containing 14 percent or more of alcohol by weight and not more than 48 percent of alcohol by weight, except wines, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of $6.50 per gallon.

(b) As to all such beverages manufactured and bottled in this state from Florida-grown citrus products, citrus byproducts, honey, fresh fruits, berries, grapes, sugarcane, guavas, potatoes, peaches, papayas, strawberries, and

mangoes, and not from concentrates thereof, except concentrates grown and concentrated in the state, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of $4.15 per gallon.

(2)(a) As to beverages containing more than 48 percent of alcohol by weight, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of $9.53 per gallon.

(b) As to beverages manufactured and bottled in this state from Florida-grown citrus products, citrus byproducts, honey, fresh fruits, berries, grapes, sugarcane, guavas, potatoes, peaches, papayas, strawberries, and mangoes, and not from concentrates thereof, except

concentrates grown and concentrated in the state, the tax imposed by paragraph (a) does not apply. However, in lieu thereof shall be paid by every manufacturer and distributor a tax at the rate of $4.75 per gallon.

(3) The use of the words "and vendor" in paragraphs (1)(a) and (2)(a) shall not be construed as imposing a new excise tax based upon sale at retail, but shall only be construed as applying the increase in tax rates to vendors' inventories of stock on June 1, 1968.

(4) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

APPENDIX E

Sections 564.06 and 565.12, Fla. Stat. (1985)

564.06 Excise taxes on wines and beverages; exemption.-

(1) As to beverages including wines, except natural sparkling wines and malt beverages, containing more than 1 percent alcohol by weight, and less than 14 percent alcohol by weight, there shall be paid by all manufacturers and distributors a tax at the rate of $2.25 per gallon

(2) As to all wines, except natural sparkling wines, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, of which the alcohol content is manufactured exclusively from citrus fruits or varieties of the species Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis

ssp. smalliana, Vitis shutleworthii, Vitis munsoniana or Vitis berlandieri, or from concentrates thereof, except for flavoring extracts, and upon all other such beverages, except malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, of which the alcohol content is manufactured exclusively from citrus fruits, varieties of the species Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shutleworthii, Vitis munsoniana or Vitis berlandieri, citrus products, citrus byproducts, sugarcane, sugarcane byproducts, or from contentrates thereof, except for flavoring extracts, the tax imposed by subsection (1) shall not apply.

(3) As to all wines, except natural sparkling wines containing 14 percent or more alcohol by weight, there shall be paid

by manufacturers and distributors a tax at the rate of $3 per gallon except that this tax shall not be required to be paid upon all wines of which the alcoholic content is manufactured exclusively from citrus fruits or varieties of the species Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shutleworthii, Vitis munsoniana or Vitis berlandieri, or from concentrates thereof, except for flavoring extracts, and containing 14 percent or more of alcohol by weight.

(4) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of $3.50 per gallon except that this tax shall not be required to be paid upon all natural sparkling wines of which the alcoholic content is manufactured exclusively from

citrus fruits or varieties of the species Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shutleworthii, Vitis munsoniana or Vitis berlandieri, of from concentrates thereof, except for flavoring extracts.

(5) Wine used by an established church as sacramental wine or in connection with religious services is hereby expressly exempted from the provisions of this section.

(6) Every distributor selling wine within the state shall pay the tax to the division monthly on or before the 10th day of the following month, less 1.9 percent of the tax due, which shall be withheld by the distributor for keeping prescribed records, furnishing bond, and properly accounting for and remitting taxes due to the state.

However, no allowance shall be granted or permitted when the tax is delinquent at the time of payment.

(7) The exemption from the payment of taxes provided in subsections (2), (3), and (4) does not preclude the division from making periodic inspections necessary to carry out the provisions of this section.

(8) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

(9) The exemptions from payment of taxes provided in subsections (2), (3), and (4) or the tax rates set forth in subsection (10) shall not apply:

(a) To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

(b) To alcoholic beverages manufactured or bottled in states, territories, or countries tries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

(c) To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Funding for research purposes or retail sale of wine at licensed wineries shall not

be construed as an "economic incentive or advantage" within the meaning of this subsection.

(10)(a) For the months of July and August each year the tax rate for the products specified in subsection (2), except for wine coolers which are defined below in paragraph (b), shall be $2.25 per gallon. Otherwise, the tax rate for these products, except wine coolers, will be determined as follows:

1. By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of the products specified in subsection (2).

* * * * *

Total gallons sold the month prior to the time of calculation	The new per in gallon tax rate for all gallons sold in the month following the time of calculation
0 - 10,000	0.00
10,001 - 20,000	0.35
20,001 - 30,000	0.55
30,001 - 40,000	0.75
40,001 - 50,000	0.95
50,001 - 60,000	1.15
60,001 - 70,000	1.25
70,001 - 80,000	1.45
80,001 - 90,000	1.65
90,001 - 100,000	1.85
100,001 - 110,000	2.05
Above 110,000	2.25

(b) For the months of July and August 1985, 40 cents per gallon will be the tax for wine coolers; a combination of wine, as described in subsection (2); carbonated water; and flavors of fruit juices and preservatives containing 1 to 6 percent alcohol content by volume. Thereafter, the tax rate for wine coolers will be determined as follows:

1. By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of wine coolers.

2. The total of sales referred to in subparagraph 1, of this paragraph shall determine the sole tax rate applicable to all gallons sold in the month after the time of calculation according to the table set forth below:

Sales of wine coolers in the month prior to the time of calculation for each month for the 6-month period of March, April, May, June, July, and August	The new per gallon tax rate for all gallons sold in the month following the time of calculation
0 - 250,000	0.40
250,001 - 275,000	0.65
275,001 - 300,000	0.90
300,001 - 325,000	1.15
325,001 - 350,000	1.40

350,001 - 375,000.....1.65
375,001 - 400,000.....1.90
Above 400,000.....2.25

Sales of wine coolers in the month prior to the time of calculation for each month for the 6-month period of September, October, November, December, January, and February	The new gallon tax rate for all gallons sold in the month following the time of calculation
0 - 100,000	0.40
100,001 - 125,000	0.65
125,001 - 150,000	0.90
150,000 - 175,000	1.15
175,000 - 200,000	1.40
200,001 - 225,000	1.65
225,001 - 250,000	1.90
250,001 - 275,000	2.15
Above 275,000	2.25

(c) For the months of July and August each year, the tax rate for the products specified in subsection (3) shall be $3 per gallon. Thereafter, the tax rate for these products will be determined as follows:

1. By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department

of Business Regulation shall determine the prior month's gallonage sales of these products.

2. The total of sales referred to in subparagraph 1, of this paragraph, shall determine the sole tax applicable to all gallons sold in the month after the time of calculation according to the table set forth below:

Total gallons sold the month prior to the time of calculation	The new per gallon tax rate for all gallons sold in the month following the time of calculation
0 - 12,500	1.50
Above 12,500	3.00

(c) For the months of July and August each year, the tax rate for the products specified in subsection (4) shall be $3.50 per gallon. Thereafter, the tax rate for

these products will be determined as follows:

1. By the 20th of each month (hereinafter, "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of these products.

2. The total of sales referred to in subparagraph 1, of this paragraph shall determine the sole tax rate applicable to all gallons sold in the month after the time of calculation according to the table set forth below:

Total gallons sold in the month prior to the time of calculation	The new per gallon tax rate for all gallons sold in the month following the time of calculation

0 - 2,000	1.50
2,001 - 4,000	2.00
4,001 - 6,000	2.50
6,001 - 8,000	3.00
Above 8,000	3.50

(e) By the 25th of each month, the Department of Business Regulation shall notify all distributors in the state of the new tax rates applicable for the following month based preceding paragraphs (10)(a),(b),(c), and (d).

(11) Any new applicant for the tax exemptions provided in subsection (2), subsection (3), or subsection (4), or for the tax rates set forth in paragraph (10)(a), paragraph (10)(b), paragraph (10)(c), or paragraph (10)(d), shall apply for those rates between July 1 and July 31 of each year, and shall pay an annual nonrefundable application fee of $3,000. The division shall adopt appropriate rules of practice and procedure to establish a

method of qualification for affected parties.

(12) Each manufacturer authorized to do business under the tax exemption provided in subsection (2), subsection (3), or subsection (4), or for the tax rates set forth in paragraph (10)(a), paragraph (10)(b), paragraph (10)(c), or paragraph (10)(d), shall pay an annual license fee of $1,000 plus travel expenses of the Department of Business Regulation to audit the manufacturer's records. Each qualifying applicant shall report monthly the source of raw materials used to manufacture the products eligible for the tax exemptions of rates set forth in subsection (2), subsection (3), or subsection (4), or paragraph (10)(a), paragraph (10)(b), paragraph (10)(c), or paragraph (10)(d).

(13) All revenue collected pursuant to subsections (11) and (12) shall go directly to the Department of Business Regulation to provide funds to administer the provisions contained herein.

565.12 Excise tax on liquors and beverages.-

(1)(a) As to beverages containing 14 percent or more of alcohol by weight and not more than 48 percent alcohol by weight, except wines, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of $6.50 per gallon.

(b) As to all such beverages of which the distilled spirits are manufactured exclusively from citrus

products, citrus byproducts, sugarcane, and sugarcane byproducts, except for flavoring extracts, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of $4.35 per gallon.

(c) The tax rate provided in paragraph (b) shall not apply:

1. To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

2. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages

exclusively for alcoholic beverages produced within their boundaries; or

3. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Those beverages shall be taxed at the rate set forth in paragraph (a).

(2)(a) As to beverages containing more than 48 percent of alcohol by weight, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of $9.53 per gallon.

(b) As to all such beverages of which the distilled spirits are manufactured exclusively from citrus

products, citrus byproducts, sugarcane, and sugarcane byproducts, except for flavoring extracts, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of $4.95 per gallon.

(c) The tax rate provided in paragraph (b) shall not apply:

1. To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

2. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide

agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

3. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Those beverages shall be taxed at the rate set forth in paragraph (a).

(3) The use of the words "and vendor" in paragraphs (1)(a) and (2)(a) shall not be construed as imposing a new excise tax based upon sale at retail, but shall only be construed as applying the increase in tax rates to vendors' inventories of stock on June 1, 1968.

(4) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

(5) For the months of July and August every year the tax rate for products specified in paragraph (1)(b) will be $6.50 per gallon and the tax rate for the products specified in (2)(b) will be $9.53 per gallon. Thereafter the tax rate for the products in paragraph (1)(b) and in paragraph (2)(b) will be determined in paragraph (6).

(6) By the 20th of each month (hereinafter, the time of calculation) commencing August 20, 1985, the Department

of Business Regulation shall determine the increase or decrease in the sale of alcoholic beverage gallonage taxed at the rates provided in paragraph (1)(b) or paragraph (2)(b) for the prior month in comparison to that month of the year before. If that gallonage has increased, the percentage amount of said increase in excess of 5 percent shall be the percentage increase in the tax rates provided in paragraph (1)(b) or paragraph (2)(b) for the gallonage sales for the month following the "time of calculation." If the gallonage has decreased, the percentage amount of said decrease in excess of 5 percent shall be the percentage decrease in the tax rates provided in paragraph (1)(b) or paragraph (2)(b) for the gallonage sales for the month following "the time of calculation." However, the tax rate provided in paragraph (1)(b) shall not

decrease below $4.35 per gallon or increase above $6.50 per gallon, and the tax rate provided in paragraph (2)(b) shall not decrease below $4.95 per gallon or increase above $9.53 per gallon.

(7) By the 25th of each month, the Department of Business Regulation shall notify all distributors in the state of the new tax rates applicable for the following month based on subsection (6).

(8) All revenue collected pursuant to subsections (9) and (10) shall go directly to the Department of Business Regulation to provide funds to administer the provisions contained herein.

(9) Any manufacturer or importer applying for the tax rate provided in paragraph (1)(b) or paragraph (2)(b) shall

apply for that rate between July 1 and July 31 of each year and shall pay a nonrefundable application fee of $5,000. The department shall adopt appropriate rules of practice and procedure to establish a method of qualification for affected parties.

(10) Each manufacturer authorized to do business under the tax rates imposed under paragraph (1)(b) or paragraph (2)(b) shall pay an annual license fee of $3,000, plus travel expenses of the Department of Business Regulation to audit the manufacturer's records. Each qualifying applicant shall report monthly the source of raw materials used to manufacture the products eligible for the tax rates provided in paragraphs (1)(b) and (2)(b).

APPENDIX F

SUPREME COURT OF THE STATE OF FLORIDA

No. 70,368

DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION,
AND OFFICE OF
THE COMPTROLLER, STATE OF FLORIDA,
et al.
Defendants/Appellants/Cross-Appellees,

v.

McKESSON CORPORATION, et al.
Plaintiff/Appellee/Cross-Appellant.

APPELLEE AND CROSS-APPELLANT
McKESSON CORPORATION'S
MOTION FOR REHEARING

Appellee-Cross-Appellant McKesson Corporation ("McKesson"), by and through its undersigned attorneys, pursuant to Florida Rule of Appellate Procedure 9.330, moves for rehearing. McKesson does not wish to reargue the merits of its case but respectfully believes that the Court has

overlooked or misapprehended certains points of law and fact in its peremptory denial of any relief for the constitutional injury McKesson has sustained during the period that Florida has collected discriminatory taxes. McKesson submits that the Court's decision denying relief overlooks both federal law established in similar cases and this Court's own decisions.[1]

---

[1] McKesson will not restate the federal constitutional law arguments that it has already made to this Court. The Court, however, cites Lemon v. Kurtzman, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973), in denying McKesson relief. The United States Supreme Court has not in this century permitted a state to collect or retain taxes assessed under an unconstitutional statute. Lemon does not hold otherwise. The Court in Lemon did not address a taxpayer's claim for relief from a discriminatory tax burden. Rather, the Court allowed payment pursuant to service contracts for services already rendered, even though the Court earlier had declared the contracts unconstitutional. Lemon simply cannot be used to authorize Florida to retain taxes that this Court has held were unconstitutionally collected.

The Court in denying McKesson's request for an appropriate refund appears to expand the holding in Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973), such that a heretofore-recognized narrow exception to the doctrine has swallowed the doctrine.[2] This Court consistently has provided a refund remedy to taxpayers who paid taxes under an unlawful scheme, although the Court has limited that remedy to those taxpayers who actually filed the suit challenging the validity of the tax

---

2 See Coe v. Broward County, 358 So.2d 214, 216 (Fla. 4th DCA 1978)(recognizing Gulesian as a narrow exception to the rule that a taxpayer is entitled to a refund of taxes paid pursuant to an unlawful assessment.

scheme.[3] In Gulesian, however, the Court allowed a carefully-reasoned exception.

In Gulesian, the circuit court, after "weighing equities and considering the slight benefits to individual taxpayers [affected by the invalid tax]," denied a refund of taxes collected under an unconstitutional statute. Gulesian, 281 So.2d at 326. Specifically, the circuit court found that plaintiffs and all other taxpayers had voluntarily paid the tax "without protest and not under compulsion;" that the School Board, which had levied the invalid tax, had relied in good faith on a presumtively [sic] valid state statute; and

---

3 See City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1, 7 (Fla. 1972); Interlachen Lakes Estates, Inc. v. Brooks, 341 So.2d 993, 995 (Fla. 1976); Osterndorf v. Turner, 426 So.2d 539, 541, 545 (Fla. 1982); City of Tampa v. Thatcher Glass Corp., 445 So.2d 578, 580 (Fla. 1984); Colding v. Herzog, 467 So.2d 980, 983 (Fla. 1985).

that requiring a refund "in small amounts to over 350,000 Dade County taxpayers would impose an intolerable burden on the School Board." Id. This Court agreed with the lower court's specific findings and reasoning and, therefore, affirmed.

In this case, however, the circuit court has not made specific findings regarding McKesson's claim for a refund and could not yet weigh the equities because the circuit court has not yet heard evidence on the issue. McKesson in its motions for partial summary judgment and for a preliminary injunction had not yet raised the issue of an appropriate refund. Therefore, when the circuit court decided to bar any relief for the injury McKesson has sustained during the period that Florida has collected the discriminatory taxes, it acted without first hearing evidence on the refund

issue.[4] McKesson has not had the opportunity to present its evidence to the lower court establishing the effect of the discriminatory tax burden on McKesson's business in Florida, including the effect on McKesson's sales, market share, and profit. In sum, McKesson has never had the opportunity to demonstrate the extent of the very competitive injury that this Court recognized in striking down the unconstitutional statutes.

Unlike the 350,000 taxpayers in Gulesian who were only slightly affected by the improper assessment, McKesson, which did pay the challenged tax under protest and did pay under compulsion, has incurred a substantial injury under a discriminatory

---

[4] McKesson raised the refund issue in this Court, as a cross-appellant, in response to the lower court's statement that its declaration of unconstitutionality would operate only prospectively, thereby barring any refund.

scheme. Further, the State in this case did not rely on invalid statutes but rather enacted the unconstitutional statutes.[5]

By applying Gulesian in this case to bar any remedy, without first instructing the lower court to hear evidence and weigh the particular equities in this case, the Court appears to expand the narrow holding in Gulesian to bar any refund of taxes collected under an unconstitutional statute so long as the statute was presumptively valid before it was declared unconstitutional. McKesson submits that under such a doctrine no taxpayer will ever be entitled to a refund for unconstitutional taxes.

---

[5]McKesson maintains that the State enacted the revised statutes to preserve the protectionism inherent in the former statutory scheme, and acted after the Florida Department of Business Regulation warned in a memorandum that the revised statutes continued the unconstitutional discriminatory effect of the old scheme.

The Court's statement that "the cost of the tax has likely been passed on to their customers" (P. 16) should not serve to bar McKesson's opportunity to present evidence on the measure of its injury. First, the circuit court has not heard evidence on this "pass-on" issue. Second, regardless of whether the cost of the discriminatory tax has been passed on to McKesson's customers, McKesson has sustained an economic injury in the competitive marketplace. In Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 267, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), the Supreme Court observed: "even if the tax is completely and successfully passed on, it increases the price of their products as compared to the exempted beverages."

Whether McKesson raised the price of its products to cover the added tax burden that the discriminatory tax scheme imposed,

thereby selling fewer products than it otherwise would have, or did not raise the price of its products to cover the added burden, thereby reducing its profit margin, McKesson has been injured.[6]

Further, this Court plainly found that McKesson has sustained a competitive injury.

> It is undisputed that manufacturers and distributors of beverages which qualify for preferential treatment under this scheme are in direct competition with manufacturers and distributors of alcoholic beverages which do not. . . . Florida's alcoholic beverage tax scheme clearly raises the relative cost of doing business for a manufacturer or distributor of alcoholic beverages which are not [favored].

(P. 12-13)

The Florida alcoholic beverage tax scheme, by design, has imposed an unconstitutional burden on McKesson by raising its cost of doing business compared to distributors of the favored products. That burden continued even after the lower court declared the discrimination unconstitutional because the State's appeal invoked the automatic stay, Fla. R. App. P. 9.310(b)(2), which the lower court declined to lift.

McKesson respectfully urges the Court to determine that McKesson is entitled, under both federal constitutional law and state law, to receive a refund of the difference between what McKesson paid in taxes and what McKesson would have paid in taxes and what McKesson would have paid if

---

6 The alcoholic beverage excise tax is significantly different from the general sales tax, which is stated separately from an item's purchase price and for which retailers simply serve as collection agents for the state. See §212.07(1)(a) and (2), Fla. Stat. (Supp. 1987).

its products had received the same treatment as the favored products. McKesson requests that the Court thereupon remand the case to the lower court to receive evidence to determine the amount of an appropriate refund.

Alternatively, McKesson respectfully requests that the Court remand this case to the lower court with instructions to hear evidence on the issue of McKesson's competitive injury, including evidence on the effect of the discriminatory burden on McKesson's business in Florida, and then to weigh the particular equities and determine the measure of any relief.

DATED: March 3, 1988

Respectfully submitted,
By Neal S. Berinhout
DAVID G. ROBERTSON
NEAL S. BERINHOUT
MORRISON & FOERSTER
California Center
345 California Street
San Francisco, CA 94104-2105
(415) 434-7000

By Chris W. Altenbernd
CHRIS W. ALTENBERND
CHARLES A. WACHTER
FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL AND BANKER, P.A.
501 East Kennedy Boulevard
Suite 1700
Tampa, FL 33601
(813)228-7411

APPENDIX G

Deposition of Stan F. Starzyk, taken November 6, 1986,
Page 79, Line 18 Through Page 83, Line 4

Q Mr. Starzyk, it's true under Florida law, is it not, that you can give no more than 10 days credit to a vendor to whom you sell alcoholic beverages?

A That's Florida law, I believe. I mean, there's more to it than that, but it's 10 days.

Q When a vendor fails to pay within 10 days, you report them to the Department of Business Regulation; is that not right?

A They are listed, yes.

Q What is the effect on a vendor when you do that to them?

A What is the effect on the vendor?

Q Yes.

A Well, if he doesn't pay his bills, then two things happen. One is he would have to be on COD.

Q And what does that mean?

A That means he would have to pay for his product on a cash basis, or it can go on a no-ship list.

Q What is a no-ship list?

A It means you are not legal -- it's not legal to ship this particular account.

Q And that would mean no distributor to ship to that vendor?

A I believe that's the way it is, yes.

Q And that vendor couldn't buy from any distributor unless he paid cash?

MR. ROBERTSON: I haven't been -- all these questions have been calling for legal conclusions.

I haven't been objecting. If you are asking for his --

MR. BROWN: I'm asking his understanding.

MR. ROBERTSON: What his practical understanding is?

MR. BROWN: That's what I want, his practical understanding of how it works.

MR. ROBERTSON: You can go to the statute if you want answers to these questions.

THE WITNESS: If you are listed -- let me go back.

If we do not receive payment, that customer is listed. He should not be -- if you are listed with the State of Florida, you as a wholesaler are not allowed to ship him product.

BY MR. BROWN:

Q In your experience -- first, let me ask this:

McKesson often does that with vendors who are tardy in making payments; isn't that true?

A Yes.

MR. ROBERTSON: Does what?

THE WITNESS: They list with the state.

BY MR. BROWN:

Q Put them on the list, do whatever is permitted by Florida law under 561.42?

A Right.

Q In your experience that has been a fairly effective means of collecting debts from vendors; has it not?

A It's not an effective means of collecting debts. It's a means by law that you cannot ship them product. But we have received so often from vendors -- even when we receive bad checks and we have been shipping them, but by the time we get the bad checks, we haven't collected for the

merchandise.

Q Once a vendor gets on a list and cannot receive shipments of beverages from any distributor in the state, isn't it true that in the vast majority of cases he will correct that mistake and get the distributor paid?

A Not true. We have suffered too many losses for that to be true.

Q How much did you lose in dollar losses in the fiscal year 1985 as a result of vendors not paying you for beverage product?

A I don't have the exact knowledge, but I'm going to approximate around $60,000.

Q Out of a total --

MR. ROBERTSON: Are you talking about Miami now or --

THE WITNESS: Talking about Miami.

BY MR. BROWN:

Q $60,000 that you never again saw,

never collected?

A Correct.

Q Out of a total sales volume of what?

A A total sales volume of 100 million dollars.

MR. BROWN: That's everything I have.

APPENDIX H

Rule 7A-4.0471, Florida Administrative Code
(Division of Alcoholic Beverages and Tobacco)

7A-4.0471 Discounts, Records, Deal Sheets.

(1) All distributors shall be required to keep as part of their accounting records a listing of all alcoholic beverage items offered for sale. These lists must reflect the prices and discounts allowed vendors on the purchase of these items. All distributors shall maintain and keep copies of their deal sheets on the licensed premises for a period of three years.

(2) To provide that the same discounts shall be offered to all vendors buying similar quantities, said deal sheets when established shall remain in effect for the remainder of day that the deal is

established. **Specific Authority 561.11 FS. Law Implemented 561.01(10), 561.42 FS. History - New 3-1-76, Formerly 7A-4.471.**